BAN HIN LEE BANK BHD

v.

LONG HUA CORPORATION SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU
SULONG MATJERAIE JC
[CIVL SUIT NO: 22-611 OF 1998]
25 NOVEMBER 1999

CIVIL PROCEDURE: *Writ of summons - Indorsement - Plaintiff's failure to indorse statement of amount claimed on writ - Rules of the High Court 1980, O. 6 r. 2 - Whether a mere irregularity - Rules of the High Court 1980, O. 2 - Whether defendant prejudiced*

This was the appellant's/defendant's appeal against the decision of the Senior Assistant Registrar ('SAR'). The appellant alleged that the SAR had erred in dismissing its application to set aside the respondent's/plaintiff's writ of summons after finding that the said writ was irregular. The appellant contended that the said writ was irregular as the respondent did not indorse the writ with a statement of the amount claimed as required by O. 6 r. 2 of the Rules of the High Court 1980 ('RHC'). As the respondent's claim involved a liquidated sum, such an indorsement was mandatory.

Held:

[1] The facts indicated that the appellant had knowledge of the amount claimed. Further, the appellant failed to reply specifically to the respondent's allegation that it was involved in a negotiation to settle the matter out of court. In the circumstances, the appellant could not be said to be prejudiced as a result of the failure of the respondent to state the amount at the indorsement of claim column.

[2] The failure of the respondent to state the amount at the indorsement of claim column was only a mere irregularity. The fact that O. 2 RHC had done away with the distinction between an irregularity and nullity, all acts and omissions that amount to non-compliance with one or more of the RHC result in their being curable irregularities.

[3] Based on a long line of authorities, omissions or mistakes in practice for failing to comply with the RHC are accepted as irregularities which the court can and should rectify provided there is no injustice.

[Appeal dismissed.]

Case(s) referred to:
Alloy Automative Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 ***(foll)***
Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors [1998] 1 CLJ 625 ***(dist)***
GL Baker Ltd v. Barclays Bank Ltd & Ors [1956] 1 WLR 1409 ***(refd)***
Harkness v. Bell Asbestos And Engineering Ltd [1966] 2 All ER 843 ***(refd)***
K Muthulagu v. Lembaga Pelabohan Klang [1996] 1 CLJ 198 ***(foll)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***
Loh Koon Moy v. Zaibunsa Syed Ahmad [1978] 2 MLJ 29 ***(refd)***
Metroinvest Anstalt & Ors v. Commmercial Union Assurance Co Plc [1985] 2 All ER 318 ***(refd)***
Mohamed Hanif & Anor v. Chin Ah Bah [1974] 2 MLJ 128 ***(refd)***
Ng Hee Thong v. Public Bank Bhd [1995] 1 CLJ 609 ***(foll)***
Paruvathy Palany v. Sathiasealan Govindasamy [1999] 6 CLJ 113 ***(refd)***
Re CHS [1997] 3 MLJ 152 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1(2), 2(1), O. 3 r. 2, O. 6 rr. 2(1), 3(1)(a), (b), O. 7 r. 3(1)

Other source(s) referred to:
Civil Procedure and Evidence, P St J Langan
Malaysian High Court Practice 1998, Desk edn, vol 1, p 72

For the plaintiff - Chua Por Ron; M/s Leng & Co
For the defendants - Gan Techiong; M/s Gan & Lim

Reported by S Selvarajah

JUDGMENT

Sulong Matjeraie JC:

Hearing Of Enclosure (18)

This is an appeal against the decision of the learned senior assistant registrar (SAR) who was alleged by the defendant to have erred in dismissing the appellant's/defendant's application at (encl. 11) with costs after finding that the plaintiff's writ was irregular.

Learned counsel for the appellant/defendant, Mr. T. Gan, submitted that what should have been done by the learned SAR would either to:

(i) allow the defendant's application with costs with liberty to file afresh; or

(ii) order the plaintiff to apply for leave to amend the writ of summons.

Learned counsel for the appellant/defendant indicated that the court had given leave to the defendant to enter a conditional appearance – encl. (8) – entered

on 17 November 1998 subject to a condition that the appellant/defendant applies to set aside the writ within 14 days. This was infact done. Hence the defendant's right to apply to set aside the writ of summon is preserved by entering a conditional appearance.

Learned counsel for the appellant/defendant submitted that before a writ is issued it must be indorsed as required by O. 6 r. 2 Rules of High Court (RHC). As the present case involves liquidated sum, indorsement which is compulsory, could be found in form 2. The indorsement, submits the learned counsel must be added there.

The plaintiff failed to state the amount and as such there was a complete failure to comply with the requirement of O. 6 r. 2(1) RHC. Accordingly, the learned SAR said that this was irregular.

A case offered by learned counsel for the appellant/defendant as authority was: *Mohamed Hanif & Anor v. Chin Ah Bah* [1974] 2 MLJ 128.

In this case the plaintiff failed to include in the indorsement, their capacity to sue as administrators of the estate. Objection was taken to the writ after entry of conditional appearance. It was held that as in the indorsement of the writ no capacity to sue was shown the objection must succeed and an order was made setting aside the writ and all subsequent proceedings.

The rule on indorsement as to capacity is O. 6 r. 3(1)(a) and learned counsel submitted that the words of O. 6 r. 2(1) and O. 6 r. 3 are exactly the same. Since Mohamed Hanif's decision is the authority to say that O. 6 r. 3(1)(a) requires indorsement, similarly O. 6 r. 2(1)(b) would be the same as well.

Another case offered by learned counsel for the appellant/defendant was the case of *Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors* [1998] 1 CLJ 625 where the Johor Bahru High Court held that in filing an appeal to judge-in-chambers, the format in Form 114 of the RHC must be complied with. Abdul Malik Ishak J said that "the format for appeal as adopted... was contrary to Form 114 of the RHC (and that the applicant) had developed a format of his own which was a complete change which was unknown to the law. As a code of procedure the RHC should be strictly followed to the letter."

In this instant case it was contented by learned counsel for the appellant/defendant that the plaintiff have failed to comply with O. 6 r. 2 RHC, the rule which, he submitted, is compulsory.

He therefore submitted that the learned SAR erred after his finding that the writ of summons was irregular, he should have allowed the defendant's application with costs.

The Respondent's/Plaintiff's Case

Learned counsel for the respondent/plaintiff Mr. P.R Chua notified this court that though the learned SAR's finding that the writ of summons was irregular, no prejudice was caused to the defendant. That was the reason given during the hearing before the learned SAR.

The plaintiff admitted that the indorsement was not there in the writ of summons but he claimed that no prejudice was caused because:

(1) The statement of claim was attached to the writ which has particularised the facts, the claim and the amount;

(2) The purpose of the indorsement is to allow the defendant to pay to the court within eight days;

The plaintiff referred to the affidavit of the defendant at encl. (10) – affirmed by Mok Chee Moi where at para. (5) it says, *inter alia*, that " saya ingin menyatakan bahawa pihak defendan menafikan kesahihan tuntutan plaintif'. Learned counsel for the respondent/plaintiff said that the appellant/defendant are denying the claim. Hence they cannot pay the money.

Conversely, the appellant/defendant is saying that they have not been given notice to pay. Therefore it was contended by the learned counsel for the respondent/plaintiff that this contradicts each other.

(3) The affidavit of Encik Roslan Mansor encl. (13), para. 8 says as follows:

> Saya ingin menyatakan bahawa Defendan-defendan di dalam keadaan ini adalah tidak *bona fide* kerana di dalam proses penyerahan Writ Saman dan Pernyataan Tuntutan tersebut, Defenda Kedua (yang merupakan pengarah Defendan Pertama dan suami Defendan Ketiga) telah menghadiri pejabat Plaintif untuk membincang kemungkinan tindakan ini diselesaikan di luar Mahkamah. Memandangkan wujudnya perbincangan di antara Plaintif dan Defendan-defendan, Plaintif telah menangguhkan masa untuk memfailkan Penghakiman ingkar keatas Defendan Pertama dan Defendan Ketiga. Sesalinan surat arahan Plaintif bertarikh 4.11.1998 kepada peguamcaranya di lampirkan dan di eksibit sebagai "RM-3".

The respondent/plaintiff said that it was not consistent with the filing of the application. They (the defendant) have notice of the claim and it does not therefore prejudice them since the amount claimed for is there.

(4) Order 2 r. 2 RHC requires that an application to set aside for irregularity shall not be allowed unless it is made within a reasonable time.

It was suggested by learned counsel for the plaintiff that exh. RM1 of encl. 13 para. 3 showed that the writ was served on 20 October 1998 and on the 3rd defendant on 21 October 1998.

This application was filed two months after the writ was served. No explanation was however given in the affidavit for the delay.

The case law referred to by learned counsel for the respondent – on such delay in making an application to set aside was:

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396. One of the matters raised in this case involved an appeal by the appellant on whether there was delay on the part of the appellant in making the application to set aside the default judgment.

He quoted Gopal Sri Ram JCA at p. 403:

> Previously, Courts, in respect of their process and orders, maintained a distinction between irregularities and nullities. The former were curable, but the latter was not. This distinction did not lend much clarity to the law. Neither did it, in the preponderance of cases, advance the course of justice.
>
> After the coming into force of the Rules of the High Court, 1980, the distinction between irregularities and nullities ceased to exist. All acts and omissions that amount to non-compliance with one or more of the rules of Court result in their being curable irregularities and not nullities. Indeed it is quite inappropriate to say of an order or decision of a Court of unlimited jurisdiction (such as the High Court and other superior Courts) that it is a nullity.

Learned counsel for the respondent/plaintiff also pointed out that the case of *Mohamed Hanif & Anor v. Chin Ah Bah* [1974] 2 MLJ 128 referred to by learned counsel for the appellant/defendant was before the coming into force the Rules of High Court 1980. All irregularities can be cured now. Even excessive interest can be cured through amendment without any resultant prejudice to anyone, see *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* (*supra* at p. 404).

Another case provided for as authority by the respondent/plaintiff was - *K. Muthulagu v. Lembaga Pelabohan Klang* [1996] 1 CLJ 198.

The questions posed in this case were whether non-endorsement was fatal or whether it was a mere irregularity which could be cured and whether application to set aside need be made within reasonable time. The learned James Foong J said that the non-endorsement on the writ on the plaintiff's representative capacity ought not be fatal as to nullify the proceeding. It was

only an irregularity and can be accepted under O. 2 r. 1(2) of the RHC. This followed the decision of Chang Min Tat FCJ in *Loh Koon Moy v. Zaibunsa Syed Ahmad* [1978] 2 MLJ 29 on circumstances which are virtually similar.

It was the submission of learned counsel for the respondent/plaintiff that since *K. Muthulagu v. Lembaga Pelabohan Klang (supra)* was after the Rules of High Court 1980, it should be preferred over the case of *Mohamed Hanif & Anor v. Chin Ah Bah (supra)*.

Learned counsel for the respondent/plaintiff also submitted that as required by O. 2 r. 2(1) RHC an application to set aside shall not be allowed unless it is made within a reasonable time and **before the party applying has taken any fresh step after becoming aware of the irregularity**.

On *Re: CHS* [1997] 3 MLJ 152, High Court, learned counsel for the respondent/plaintiff drew the attention of this court to the decision of the learned Augustine Paul JC (as his Lordship was then) at p. 160 where it echoed the sentiment expressed in *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1996] 1 CLJ 396 that the RHC had done away with the old distinction between a nullity and an irregularity and likewise adopted the approach of Cumming – Bruce LJ in the English Court of Appeal decision on the widest power in order to do justice in *Metroinvest Anstalt & Ors v. Commmercial Union Assurance Co Plc* [1985] 2 All ER 318 at p. 324.

This court was notified that after their submission before the learned SAR, it was ruled that **no prejudice was caused** to the appellant/defendant.

On the submission by the learned counsel for the appellant/defendant regarding the authority provided for in *Dato Wong Gek Meng v. Pathmanathan Mylvaganam & Ors* [1998] 1 CLJ 625, learned counsel for the respondent/plaintiff said the case can easily be distinguished in that Form 114 of the RHC was totally different from the format " developed" by plaintiff in the said case.

Another case cited was *Paruvathy Palany v. Sathiasealan Govindasamy* [1999] 6 CLJ 113; [1999] 5 MLJ 151 where it was suggested that the court agrees with the decision of *Re: CHS (supra)* and Abdul Malik Ishak J said at p. 169 that ... "every omission or mistake in practice or procedure should be regarded as an irregularity which the court could and should rectify so long as it would not cause an injustice."

It was therefore submitted that no prejudice has been caused to the appellant/defendant here and learned counsel prayed for the appeal be dismissed with costs.

Learned counsel for the appellant/defendant in his reply pointed out that in *Paruvathy Palany v. Sathiasealan Govindasamy (supra)* Abdul Malik Ishak J said at p. 129 that:

> ... Looking at encl. 5, a concise statement of the relief claimed in the proceedings begun by originating summons with sufficient particulars to identify the cause of action had been fulfilled by the plaintiff, thereby falling within the ambit of O. 7 r. 3(1) of the RHC.

Further it was also argued that O. 2 r. 2 of the RHC requires that an application be made to set aside for irregularity.

Learned counsel also distinguished the case of *K Muthulagu v. Pelabohan Klang (supra)* and this instant case in that in *K Muthulagu* the application was made to set aside the writ after calling the witnesses and going through with the trial and having closed their case and made their submission. It was obvious also that the defendant did not enter conditional appearance to preserve the right to set aside the writ of summons. They have therefore breached O. 2 r. 2 of the RHC themselves and were therefore rightly precluded to set aside the writ of summons.

Turning back to the case of *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd (supra)* learned counsel for the appellant/defendant quoted the penultimate paragraph of the decision of Gopal Sri Ram JCA under the heading: Excessive interest at p. 404 which says:

> It is still a matter that may be cured by amendment without any resultant prejudice to anyone. The Plaintiff had applied to (do) just that... . But I must say that I am in agreement with the Judge that the judgment is not irregular in any way.

This case has to be distinguished submits learned counsel for the appellant/defendant in that it relates to the issue of amount of interest awarded. The plaintiff had made an application to amend. It does not relate to the issue of commencement of proceeding.

In addition to the above, learned counsel to the appellant/defendant argued further that while the statement of claim may have been attached to the writ of summons, this does not relate to a situation after the service of the writ. It goes to the "very root" of the writ of summons. Before a writ is issued it **must be indorsed** ..." It was therefore submitted that this has to be complied with as it is a mandatory provision.

It was argued as well that even if the respondent/plaintiff had entered a default judgment the appellant/defendant could still set it aside as the writ was defective ab initio.

Regarding the alleged negotiation, the appellant/defendant denies any negotiation and this is reflected at para. 7 of the affidavit of Mok Chee Moi (f) affirmed on 18 December 1998 which said:

> 7. Saya menafikan kandungan afidavit Roslan Bin Mansor, yang tiada kaitan dengan permohonan pihak Defendan untuk membatalkan writ saman yang nyata cacat.

It was further argued by learned counsel for the appellant/defendant that they have not taken any step but had entered only a conditional appearance and had applied by way of a summon-in-chambers (encl. (11)) to set aside the writ. This was dismissed with costs. Hence this appeal.

The appellant/defendant submits therefore that the respondent/plaintiff cannot be allowed to sit back. It should be set aside with liberty to file afresh or the plaintiff should be ordered to apply for leave to amend and costs to be given to the appellant/defendant.

Historical Background

It is believed that we followed closely the English Rules of Supreme Court when our Rules of High Court 1980 was formulated.

In England, every writ has to be in one of the five forms prescribed in appendix A to the Rules of the Supreme Court. The two in most general use are No. 1, where the writ is to be issued out of the central office, and No. 2 for issue out of a district registry. Blank forms are available from the royal courts of justice and from law stationers, and a plaintiff or his solicitor will usually fill up such a form rather than write out the writ in full himself.

After the plaintiff has filled in the body of the writ, three further steps have to be taken before he can be said to have commenced his action. The writ must be indorsed, issued and served.

Indorsing the writ simply involves filling up the blank spaces on the back of the form see *Civil Procedure and Evidence* by P St J Langan who said at this stage at least more of the following indorsements will be necessary:

(a) Indorsement of claim.

(b) Indorsement as to capacity.

(c) Indorsement as to place where the cause of action arose;

(d) Indorsement as to Solicitor and address.

In our jurisdiction, we have the indorsements in respect of (a), (b) and (d).

Usually, the statement of claim will not be indorsed on the writ: it may be served later in the course of the pleadings, or a separate document containing a statement of claim may be served along with the writ.

The "concise statement of the nature of the claim" referred to in O. 6 r. 2(1)(a) is what was formerly known as a" general indorsement".

It would appear that a "liquidated demand" is described in the Supreme Court Practice as one "in the nature of a debt, *ie*, a specific sum of money due or payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. The addition of any other claim to that for the debt or liquidated demand, even one in the alternative takes the case out of the requirement of O. 6 r. 2(1)(b), see the English Court of Appeal decision in *GL Baker Ltd v. Barclays Bank Ltd & Ors* [1956] 1 WLR 1409.

It is believed that because statement of claim are not normally indorsed on the writ that the indorsement of claim must be done properly.

The Law

This appeal is purely based on the contention that the learned senior assistant registrar had erred in dismissing the appellant/defendant's application with costs on encl. 11 after making a finding that the writ of summons No. 22-611-1998 (encl. 2) was irregular. The reason for the appeal being, the writ failed to comply with O. 6 r. 2(1)(b) Rules of High Court.

Order 6 r. 2(1)(b) says:

2(1) Before a writ is issued it must be endorsed –

(b) Where the claim made by the plaintiff is for a debt or liquidated demand only, with a statement of the amount claimed in respect of the debt or demand and for costs and also with a statement that further proceedings will be stayed if, within the time limited for appearing, the defendant –

(i) except in either of the cases mentioned in para. (2), pays the amount so claimed to the plaintiff or his solicitor;

(ii) in either of the said cases, pays that amount into court.

The argument of learned counsel for the appellant is simply this. Before a writ is issued it **must** be indorsed. As this is a claim which involves a liquidated sum, indorsement is mandatory in view of the word **"must"** .

a It is his argument that as the writ must be in Form 2 and since Form 2 contains a provision on indorsement of claim, the failure of the respondent is stating the amount claimed for, means that they have failed to comply with the mandatory provision. This he argued goes to the very root of the writ of summon. It is defective ab initio.

b Apart from "memorandum to be subscribed on the writ" there are three "indorsements to be made on writ before issue". These are "indorsement of claim", "indorsement as to solicitor and address" and "Indorsement as to service". For our purpose only indorsement of claim require elaboration.

c The indorsement of claim of Form 2 reads as follows:

> The Plaintiff's claim is for ... (If the Plaintiff's claim is for a debt or liquidated demand only, the following indorsement must be added at the foot of that claim:)
>
> *d* And $ ... (or such sum as may be allowed on taxation for costs, and also, if the Plaintiff obtains an order for substituted service, the further sum of $ ... (or such sum as may be allowed on taxation). If the amount claimed and costs be paid to the Plaintiff or his Solicitor within 8 days after service hereof (inclusive of the day of service), further proceedings will be stayed, but if it appears from the indorsement on the writ that
> *e* the Plaintiff is resident outside the scheduled territories, as defined by the Exchange Control Act, 1953, or is acting by order or on behalf of a person so resident, proceedings will only be stayed if the amount claimed and costs is paid into Court within the said time and notice of such payment in is given to the Plaintiff or his Solicitor.

f Previously before a writ is issued it must be indorsed with a statement of claim (a specially indorsed writ) or, if the statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby (a generally indorsed writ). The previous distinction between a generally indorsed writ of summons under
g O. 3 r. 2 RHC 1957 and O. 3 r. 2 RSC 1934, and a specially indorsed writ of summons under O. 3 r. 6 RHC 1957 and O. 3 r. 5 RSC 1934 no longer exists. Therefore, if the litigant elects to indorse his writ with a statement of claim, he can do so in any type of action, the limitation of the old specially indorsed writ of summons to a claim for a debt or liquidated demand only is
h removed. (see *Malaysian High Court Practice 1998*, Desk edn, vol. 1 at p. 72).

It could be seen therefore that the indorsement of claim at Form 2 would show the following things:

i

(i) the amount claimed and costs;

(ii) that further proceedings will be stayed if, within 8 days (time limited for acknowledging service), the defendant pays the amount claimed and costs to the plaintiff or his solicitor; and

(iii) that if it appears from the indorsement on the writ the plaintiff is resident outside scheduled territories as defined by Exchange Control Act 1953 or acting on behalf of person so resident, proceedings will only be stayed if amount claimed and costs is paid within 8 days and notice of such payment in is given to the plaintiff or his solicitor.

Note: Outside schedule territories as defined by Exchange Control Act 1953 means outside Malaysia.

The writ of summons (encl. 2) – at p. 2 contains the indorsement of claim but what the plaintiff failed to do was to write down the actual figures of the amount due and owing. This was admitted to by the plaintiff. However if one were to peruse the statement of claim dated 14 September 1998 and indorsed to writ of summons, one could see at para. 12 thereof that the plaintiff was claiming for:

(a) jumlah sebanyak RM2,236,522.87 (yang dikira setakat 25 August 1998) yang terhutang di bawah pinjaman tetap tersebut bersama dengan faedah seterusnya pada kadar 2.5% setahun atas kadar pinjaman asas plaintif yang dikompaunkan pada setiap bulan dari 1 September 1998 sehingga tarikh pembayaran/penyelesaian penuh bersama-sama dengan faedah penalti pada kadar 1% setahun (tertakluk kepada jumlah minima RM5 sebulan) keatas amaun yang tertunggak sejumlah RM127,350.20 dari bulan Ogos, 1998 sehingga tarikh pembayaran/penyelesaian penuh;

(b) jumlah sebanyak RM1,241,349 (yang dikira setakat 25 August 1998) dan faedah seterusnya pada kadar 2.5% setahun atas kadar pinjaman asas plaintif atas jumlah sebanyak RM1,200,000 (iaitu had kemudahan overdraf yang diluluskan) dan 4% setahun atas kadar pinjaman asas plaintif atas amaun yang melebehi RM1,200,000 yang dikira pada dasar harian dan dikompaunkan pada setiap bulan dan 26 August 1998 sehingga tarikh pembayaran/penyelesaian penuh;

(c) Kos; dan

(d) ...

It is obvious that the amount claimed consisted of two main facilities, *ie*, the fixed loan and an overdraft facility. Each banking facility attracts different interest rate over the plaintiff's base lending rate and in addition there is the penalty interest and interest even in one facility may be calculated on yearly rests, monthly rests or even daily rests!

This is the dilemma faced by practitioners: to put the amount or leave it blank as in this case. If an amount is stated there, it may not even be accurate on the day of filing especially so when facilities offered by the bank attracts varying interest rates which again are based on the individual bank's base lending rate. Failure to state the amount could end with litigation like this instant case.

One could only sympathise with the difficulty faced by practitioners who may have to file a writ of summon in respect of debts for facilities which includes fixed loan, overdraft, trust receipts, bankers acceptance, revolving credit facilities, all under one instrument. Be that as it may, the question here is, must the amount be stated in the indorsement of claim. The appellant as outlined earlier said it must be so stated.

The respondent submitted that although the indorsement was not there this does not however cause any prejudice to the appellant. The statement of claim was, in any event, attached to the writ which has particularised the fact, the claim and the amount. As could be seen above the indorsement is to allow the appellant to pay within eight days.

The facts of this case appear to suggest that the defendant was aware of the amount claimed. Could she therefore be said to have been prejudiced?

In her affidavit in reply affirmed on 1 December 1998 and filed herein at encl. 10 she denies the authenticity of the claim: see para. 5 thereof.

It was only at the following para. 6 that she said she was advised that the writ was defective as it failed to observe O. 6 r. 2(1)(b) RHC. It is arguable, of course, if this paragraph complies with O. 41 r. 5(2) RHC.

Another factor to support the contention that the defendant was aware of the amount claimed in para. 8 of the affidavit of the respondent, affirmed by its manager, Encik Roslan bin Mansor on 11 December 1998 and filed herein at encl. 13. There is a clear and unequivocal assertion that the second defendant (who is the director of the 1st defendant company and the husband of the third defendant) came to the office of the plaintiff to discuss the possibility of settling this matter out of court. Would it be right for the defendant to say that they are not aware and was therefore prejudiced?

The defendant merely denied the contents of the abovestated affidavit of Encik Roslan bin Mansor and further alleged at para. 7 of their affidavit at encl. 15 that it has no relevance to their application to strike out the writ of summon. Therefore the assertion of the plaintiff remained unchallenged.

It is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission of the fact so asserted, per Gopal Sri Ram JCA in *Ng Hee Thong v. Public Bank Bhd* [1995] 1 MLJ 281 at p. 286. See also the Supreme Court decision in *Alloy Automative Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 at 385 where Lee Hun Hoe (CJ Borneo) said "there is force in the appellant's contention that an affidavit must reply specifically to the allegations, and if it does not, then those allegations not replied to must be taken to have been accepted."

Although the defendant may argue that they have denied generally in their affidavit at encl. 15 the governing principles as enunciated earlier could not possibly assist them.

In the circumstances despite the knowledge of the defendant of the amount claimed and their failure to reply specifically to the allegation asserted in the plaintiffs affidavit that they were involved in a negotiation to settle the matter out of court, can the defendant be said to have been prejudiced as a result of the failure of the plaintiff to state the amount at the indorsement of claim column?

With respect, it is the view of this court that the defendant has not suffered prejudice as a direct consequence of the plaintiffs failure to state the amount at the indorsement of claim column.

It is also the view of this court that such failure is only a mere irregularity. The fact that O. 2 of the RHC had done away with the distinction between an irregularity and nullity, all acts and omissions that amount to non-compliance with one or more of the RHC result in their being curable irregularities.

Instances where our courts have regarded omissions or mistakes in practice and procedure as irregularity include accepting an application prayed by way of originating motion be treated as the originating summons in *Re CHS* [1997] 3 MLJ 153; failure to endorse the plaintiffs representative capacity in the writ in accordance with O. 6 r. 3(1)(e) RHC in *K Muthulagu v. Lembaga Pelabuhan Klang* [1996] 1 CLJ 198; [1995] 3 MLJ 157 which followed the decision of Chang Min Tat SCJ in *Loh Koon Moy & Anor v. Zaibun Sa Syed Ahmad* [1978] 2 MLJ 29.

It is to be noted that there is a long line of authorities accepting omission or mistakes in practice to comply with the Rules of High Court as an irregularity which the court can and should rectify so long as it can do so without injustice per Lord Denning in *Harkness v. Bell Asbestos And Engineering Ltd* [1966] 2 All ER 843.

The approach of Cumming-Bruce LJ on the manner of exercising the discretion to rectify an irregularity in *Metroinvest Anstalt v. Commercial Union Assurance Co Plc* [1985] 2 All ER 318 has been accepted by our Court of Appeal in *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 per Gopal Sri Ram JCA at p. 404. For easy reference the approach of Cumming-Bruce LJ is appended hereunder:

> I would say that in most cases the way in which the court exercises its power under O. 2 r. 1(2) is likely to depend on whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say the particular failure to comply with the rules. But I would construe O. 2 r. 1(2) as being so framed as to give the Court the widest possible power in order to do justice.

There is no need to go further to consider the submission of the learned counsel for the plaintiff regarding the requirement for an application to set aside a writ to be made within a reasonable time.

In light of what has been outlined earlier, this court is satisfied that the defendant was not prejudiced by the omission of the plaintiff in not stating the amount on the indorsement of claim.

Accordingly, this court hereby dismiss the appeal of the appellant/defendant with costs.